

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWRENCE ROSENBERG,

51 Louisiana Ave., N.W., Washington, D.C.,
20001-2113. Phone: 202-879-3939

Plaintiff

v.

UNITED STATES DEPARTMENT OF
IMMIGRATION AND CUSTOMS
ENFORCEMENT,
UNITED STATES MARSHALS SERVICE,
EXECUTIVE OFFICE FOR UNITED
STATES ATTORNEYS, and
FEDERAL BUREAU OF INVESTIGATION,

Defendants

CIVIL ACTION NO. _____

COMPLAINT

COMPLAINT

COMES NOW the Plaintiff, Lawrence Rosenberg, and for his cause of action states as follows:

GENERAL ALLEGATIONS

1. This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331, 1346(a)(2) and 5 U.S.C. § 552(a)(4)(B).
2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(e)(3), 1402(a)(1) and 5 U.S.C. § 552(a)(4)(B).
3. Plaintiff Lawrence Rosenberg is a citizen of the United States of America and a resident of Silver Spring, Montgomery County, Maryland.

4. Defendant, United States Department of Immigration and Customs Enforcement (ICE) is a government entity doing business in all of the United States of America. The ICE principal place of business is 500 12th St., S.W., Washington, D.C. 20536.

5. Defendant, United States Marshals Service (USMS) is a government entity doing business in all of the United States of America. The USMS principal place of business is the United States Courthouse, 3rd & Constitution Avenue, N.W., Room 1103, Washington, D.C. 20001.

6. Defendant, Executive Office for United States Attorneys (EOUSA) is a government entity doing business in all of the United States of America. The EOUSA principal place of business is 950 Pennsylvania Ave., N.W., Room 2242, Washington, D.C. 20530.

7. Defendant, Federal Bureau of Investigation (FBI) is a government entity doing business in all of the United States of America. The FBI principal place of business is 935 Pennsylvania Ave., N.W., Washington D.C. 20535.

8. This is an action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552 for injunctive and other appropriate relief, and seeking the immediate processing and release of agency records requested by the Plaintiff, Lawrence Rosenberg, from Defendants, ICE, USMS, EOUSA, and FBI, and for Defendants to produce a *Vaughn* index for any redacted material.

9. The FOIA gives a citizen, here Lawrence Rosenberg, the right to seek access to the records of the Defendants, ICE, USMS, EOUSA, and FBI.

10. The basic purpose of the FOIA is to ensure an informed citizenry, which is essential to check against corruption and hold the governors accountable to the governed – a practice which is fundamental to the functioning of a democratic society.

FACTS

11. On September 28, 2011, FOIA requests were made by Plaintiff Lawrence Rosenberg to ICE, USMS, EOUSA, and FBI. Mr. Rosenberg is an attorney for Sholom Rubashkin, the subject of many of Mr. Rosenberg's inquiries, and each request contained the appropriate authorization form signed by Sholom Rubashkin, permitting the release of his personal information to Mr. Rosenberg.

12. On October 3, 2011, EOUSA acknowledged receipt of Mr. Rosenberg's FOIA request in two letters signed by Susan B Gerson. The first letter informed Mr. Rosenberg that his request had been split into two separate requests and assigned numbers 2011-3285, and 2011-3284. As justification for how or why the request was split, the letter merely said that it was "based on the nature of what you sought." With no further explanation of the reason for the split, Plaintiff lacked all relevant information as to why the request was split and could not have appeal the decision to split the request.

13. The first letter from Ms. Gerson further noted that request 2011-3285 would not be satisfied by the EOUSA, seemingly because EOUSA reasoned that it concerns a third party. The letter did not specify which third party is implicated, nor did it address Mr. Rubashkin's signed authorization to release his personal information to Mr. Rosenberg. Given Mr. Rubashkin's signed permission to release information to Mr. Rosenberg, which was provided to EOUSA, and given that all of the requests concerned Mr. Rubashkin's case, EOUSA's reference to the Privacy Act for information regarding Mr. Rubashkin is nonsensical. The letter provided no coherent reason for EOUSA's Privacy Act or any other concerns, and provided insufficient information to support an appeal of EOUSA's decision not to release the unidentified information.

14. EOUSA's second October 3, 2011 letter suggests that request 2011-3284 would be satisfied within one month.

15. On December 13, 2011 and on February 7, 2012, Shirley Botts of the EOUSA informed undersigned counsel that EOUSA would not explain why the September 28, 2011 request had been split into two requests. She also refused to explain the criteria used to place certain inquiries into request number 2011-3284, and others into request number 2011-3285. She also said that she would not look into request 2011-3285 to ascertain why Mr. Rubashkin's signed authorization was insufficient to warrant release of his information to Mr. Rosenberg.

16. On both occasions, and notwithstanding EOUSA's October 3, 2011 letter, Ms. Botts further informed undersigned counsel that no timeline could be estimated for satisfaction of request 2011-3284.

17. On October 5, 2011, the FBI acknowledged receipt of Mr. Rosenberg's FOIA request in a letter signed by David Hardy. The letter suggested that the request is being processed and assigned a reference number, 1174698-000.

18. On February 7, 2012, after unreturned phone calls on December 13, 2011 and January 27, 2012, a representative from the FBI informed undersigned counsel that no timetable could be estimated for satisfaction of request number 1174698-000.

19. On October 6, 2011, ICE acknowledged receipt of Mr. Rosenberg's FOIA request in a letter signed by Catrina Pavlik-Keenan. The letter suggested that the request would be satisfied within 30 business days and assigned a reference number, 2012FOIA00054.

20. Months later, on January 3, 2012, and February 16, 2012 ICE responded to request number 2012FOIA00054. All of the documents in the response had bates numbers from a 2009 FOIA request made by Sholom Rubashkin. Mr. Rosenberg's request number 2012FOIA00054

was entirely inclusive of, and broader in scope than, Mr. Rubashkin's 2009 request. However, despite the broader scope of Mr. Rosenberg's request number 2012FOIA00054, ICE's response to the 2011 request included far less information than the response to Mr. Rubashkin's 2009 request.

21. The responses ICE did give were heavily redacted. The redactions were justified with nothing more than bare references to various provisions of 5 U.S.C § 552(b).

22. ICE misapplied the provisions of 5 U.S.C. § 552(b) countless times over thousands of pages of production. For one example, ICE routinely cited 5 U.S.C. § 552(b)(7)(E) as justification for redacting the name of a proposed 2000 raid in Postville, Iowa. Subsection (b)(7)(E) exempts information that would "disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The use of 5 U.S.C. § 552(b)(7)(E) was improper because the name was of a raid that was planned for over a decade ago, the raid never happened, and the raid targeted a now-defunct corporation.

23. ICE so over-redacted many documents that they were rendered devoid of relevant information. For example, ICE repeatedly redacted the entire address lines from intra-government e-mails so that it was impossible to tell which government agencies were communicating with one another. Intra-government communication is at the heart of Mr. Rosenberg's request.

24. In many other instances, ICE so over-redacted documents that Plaintiff could not assess whether the proper privilege had been asserted. "Attorney-client" or "attorney work product"

privilege were routinely claimed, without any description of the name or position of any attorney, and without a *Vaughn* index to describe the communication.

25. On March 16, 2012, Plaintiff sent a written appeal to the ICE Office of Principal Legal Advisor requesting a complete response to request number 2012FOIA00054, a reevaluation of the excessive redactions, and a *Vaughn* index for any redactions deemed proper on review.

26. On March 23, 2012, nearly six full months after ICE received request number 2012FOIA00054, ICE informed undersigned counsel that it was not prepared to give any timetable for the resolution of Mr. Rosenberg's appeal.

27. On October 11, 2011, the USMS acknowledged receipt of Mr. Rosenberg's FOIA request in a letter signed by Cynthia Castañeda. The letter suggested that the USMS intends to respond in full. The letter also notes that "some" of the information requested will be furnished by the EOUSA. The letter also assigns a reference number 2011USMS18477.

28. On November 25, 2011, the EOUSA sent a letter to Mr. Rosenberg signed by Susan B. Gerson. The letter communicates that the USMS had forwarded Mr. Rosenberg's FOIA request to the EOUSA, with a new reference number 11-3792-R. The letter stated that EOUSA reviewed 66 pages of material, releasing 59, and withholding seven. The letter informed Mr. Rosenberg that the EOUSA considers request 11-3792-R satisfied in full.

29. On December 13, 2011, Cynthia Castañeda of the United States Marshals told the undersigned counsel on the telephone that the USMS considers request number 2011USMS18477 fully satisfied, even though only those parts of the request forwarded to the EOUSA have been furnished to Mr. Rosenberg. The USMS never sent any additional documents to Mr. Rosenberg.

30. As of March 23, 2012, none of the above agencies have completely fulfilled Mr. Rosenberg FOIA requests.

31. As of March 23, 2012, none of the above agencies have explained to Mr. Rosenberg why his requests constitute an “unusual circumstance,” requiring more time pursuant to 5 U.S.C. § 552(a)(6)(B).

32. 31. As of March 23, 2012, none of the above agencies have explained to Mr. Rosenberg why his requests constitute an “exceptional circumstance,” requiring more time pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

33. As of March 23, 2012, none of the above agencies have given an estimate of when the requests will be fully honored.

COUNT 1. FAILURE TO COMPLY WITH A FOIA REQUEST

1. As set forth in 5 U.S.C. § 552(a)(6)(A), an agency must make a determination regarding a FOIA request within 20 days of receipt of a request.

2. If an agency faces “unusual circumstances,” and cannot make such a determination within 20 days, the agency must extend its time pursuant to 5 U.S.C. § 552(a)(6)(B), and consult with requester considering an alternative schedule.

3. Upon determination by an agency to comply with a request for records, the records shall be made promptly available to a requester. *See* 5 U.S.C. § 552(a)(6)(C)(i).

4. If an agency does not comply with the time limits set forth in 5 U.S.C. § 552(a)(6), a party is deemed to have constructively exhausted his administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i).

5. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), in “exceptional circumstances” where an agency cannot meet applicable time limits, the agency must show that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request.

6. The phrase “exceptional circumstances” does not include a delay that results from a predictable agency workload of FOIA requests. *See* 5 U.S.C. § 552(a)(6)(C)(ii).

7. With regard to request 2012FOIA00054 to ICE, over five months have passed since the September 28, 2011 request, and the request has not been satisfied.

8. ICE’s purported satisfaction of 2012FOIA00054 was incomplete, and involved excessive and improper redaction.

9. ICE’s incomplete search and over-redaction of documents are attempts to thwart the citizen-oversight basis for FOIA.

10. ICE has improperly withheld the agency records requested in Plaintiff’s FOIA request.

11. Mr. Rosenberg has exhausted administrative remedies regarding request number 2012FOIA00054 to ICE.

12. With regard to request number 1174698-000 to the FBI, over five months have passed since the September 28, 2011 request, and no documents have been produced by the FBI.

13. FBI has improperly withheld the agency records requested in Plaintiff’s FOIA request.

14. There has been constructive exhaustion of administrative remedies regarding request number 1174698-000 sent to the FBI.

15. With regard to request number 2011USMS18477 to the USMS, though the USMS’s October 11, 2011 letter said only “some” of the information Plaintiff requested was in the EOUSA’s possession, over four months have passed since the EOUSA produced “some” of the responsive documents, and USMS has not sent any additional documents to Plaintiff.

16. Over five months have passed since USMS told undersigned counsel on the phone that USMS considers request number 2011USMS18477 complete, and USMS has sent Plaintiff no written document declaring that the request has been satisfied.

17. USMS has improperly withheld the agency records requested in Plaintiff's FOIA request.

18. There has been constructive exhaustion of administrative remedies regarding request number 2011USMS18477 to the USMS.

19. With regard to request 2011-3284 to EOUSA, EOUSA has informed the undersigned counsel that, over five months since Plaintiff's September 28, 2011 request, there is no timetable for production of responsive documents.

20. EOUSA has improperly withheld the agency records requested in Plaintiff's FOIA request.

21. There has been constructive exhaustion of administrative remedies regarding request number 2011-3284.

22. With regard to request 2011-3285 to EOUSA, EOUSA gave incoherent responses to the undersigned counsel's questions about splitting the September 28, 2011 request and incoherent justification for ignoring Mr. Rubashkin's authorization to release information to Mr. Rosenberg.

23. Over five months have passed since the September 28, 2011 request, and EOUSA has still not given Plaintiff coherent responses regarding request number 2011-3285. and EOUSA has not extended its time to do so pursuant to 5 U.S.C. § 552(a)(6)(B).

24. There has been constructive exhaustion of administrative remedies regarding request number 2011-3285.

25. With regard to request 2011-3285 to EOUSA, given the EOUSA's disregard for Mr. Rubashkin's signed authorization, as well as EOUSA's subsequent refusal to specify why or how

the requests were divided in the first place, appeal within the EOUSA would have been futile. Furthermore, given EOUSA's demonstrated recalcitrance and the time constraints of a case being prosecuted by Mr. Rosenberg and Mr. Rubashkin's other attorneys that needs the information requested in the September 28, 2011 request, waiting for additional EOUSA processes would cause Plaintiff irreparable harm. In addition, given EOUSA's heretofore incoherent actions and explanations, requiring exhaustion would not serve the purposes of the exhaustion doctrine.

26. As all Defendants have all improperly withheld agency records, and administrative remedies have been exhausted as to all of Plaintiff's requests, the District Court should enjoin Defendants to comply with their obligations under the FOIA.

WHEREFORE, Plaintiff Lawrence Rosenberg requests that the Court enter an injunction and other appropriate relief, as to Defendants ICE, EOUSA, USMS, and FBI, requiring Defendants to immediately process and release agency records requested by Plaintiff, and to produce *Vaughn* indices fully describing any redacted material

Respectfully submitted,

Date: March 23, 2012

\s\ Lawrence Rosenberg
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